(2)

No. 90-1595

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAKAH INDIAN TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Petitioner Makah Indian Tribe sought to intervene in this complex fishing-rights litigation, in which the district court entered its judgment in 1969, after a proposed agreement to implement certain portions of the judgment had been negotiated and presented to the district court. The question presented is:

Whether the district court abused its discretion by denying petitioner's motion to intervene on the ground that it was untimely.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Caterino v. *Barry*, 922 F.2d 37 (1st Cir. 1990)	17
City of Bloomington v. *Westinghouse Elec. Corp.*, 824 F.2d 531 (7th Cir. 1987)	18
Culbreath v. *Dukakis*, 630 F.2d 15 (1st Cir. 1980)	18
Donovan v. *United Steelworkers*, 721 F.2d 126 (3d Cir. 1983), cert. denied, 467 U.S. 1252 (1984)	17
Farmland Dairies v. *New York State Dep't of Agric.*, 847 F.2d 1038 (2d Cir. 1988)	18
Fiandaca v. *Cunningham*, 827 F.2d 825 (1st Cir. 1987)	17-18
Gould v. *Alleco*, 883 F.2d 281 (4th Cir. 1989), cert. denied, 110 S. Ct. 870 (1990)	17
Idaho ex rel. Evans v. *Oregon*, 462 U.S. 1017 (1983)	4
Jenkins by Agyei v. *Missouri*, 855 F.2d 1295 (8th Cir. 1988), cert. denied, 490 U.S. 1034 (1989)	17
Jones v. *Caddo Parish School Board*, 735 F.2d 923 (5th Cir. 1984)	17
Lomayaktewa v. *Hathaway*, 520 F.2d 1324 (9th Cir. 1975), cert. denied, 425 U.S. 903 (1976)	22
Makah Indian Tribe v. *Verity*, 910 F.2d 555 (9th Cir. 1990)	3, 7, 20, 21
Martin v. *Wilks*, 490 U.S. 755 (1989)	16, 18
Missouri v. *Jenkins*, 110 S. Ct. 1651 (1990)	17
NAACP v. *New York*, 413 U.S. 345 (1973)	11

Cases—Continued: Page

Sohappy v. *Smith*:
302 F. Supp. 899 (D. Or. 1969) 5
529 F.2d 570 (9th Cir. 1976) 5
Stallworth v. *Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977) 17
United States v. *City of Chicago*, 897 F.2d 243 (7th Cir. 1990) 18
United States v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983) 18
United States v. *Kemper Money Mkt. Fund*, 704 F.2d 389 (7th Cir. 1983) 18
United States v. *Oregon*:
699 F. Supp. 1456 (D. Ore. 1988) 9
657 F.2d 1009 (9th Cir. 1981) 5
718 F.2d 299 (9th Cir. 1983) 5
745 F.2d 550 (9th Cir. 1984) 5, 12, 18, 19
769 F.2d 1410 (9th Cir. 1985) 5
United States v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd and modified, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) 4
United States v. *Washington*, 626 F. Supp. 1405 (W.D. Wash. 1982), aff'd, 730 F.2d 1314 (9th Cir. 1984) 3
Walker v. *Jim Dandy Co.*, 747 F.2d 1360 (11th Cir. 1984) 18
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 4
Washington Crab Producers, Inc. v. *Mosbacher*, 924 F.2d 1438 (9th Cir. 1991) 3, 4
Wichita & Affiliated Tribes v. *Hodel*, 788 F.2d 765 (D.C. Cir. 1986) 22
Treaty with the Makah Tribe, Jan. 31, 1855, art. IV, 12 Stat. 940 2
Act of Apr. 8, 1918 (Oregon-Washington River Fish Compact), ch. 47, 40 Stat. 515 9

Treaty, statutes, regulations and rules:	Page
Fishery Conservation and Management Act of 1976 (Magnuson Act), 16 U.S.C. 1801 *et seq.*:	
§ 302(a)(6), 16 U.S.C. 1852(a)(6)	3
§ 302(i), 16 U.S.C. 1852(i)	20
§ 304, 16 U.S.C. 1854	3
50 C.F.R.:	
Pt. 661	20
Pt. 661:	
App. § II.A.	20
Fed. R. Civ. P.:	
Rule 24	11
Rule 24(a)(2)	6, 19
Rule 24(b)	6
Miscellaneous:	
55 Fed. Reg. (1990):	
p. 18,894	20
p. 18,895	20

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1595

MAKAH INDIAN TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A59) is reported at 913 F.2d 576. The opinion of the district court denying petitioner's motion to intervene (Pet. App. C1-C40) is reported at 122 F.R.D. 571. The opinion of the district court sustaining the fishery management plan on the merits is reported at 699 F. Supp. 1456.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1990. The petition for rehearing was denied on January 11, 1991. Pet. App. D1-D2. The petition for a writ of certiorari was filed on April 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The district court entered its judgment in this complex fishing-rights case in 1969, broadly declaring the treaty rights of four Indian tribes to take fish from usual and accustomed places on the Columbia River and limiting the authority of the State of Oregon to regulate such fishing. In 1988, petitioner, an Indian tribe that neither takes fish from locations along the Columbia River or its tributaries nor claims any treaty right to do so, moved to intervene. Pet. App. C2-C3. Its motion was filed only after the United States, the States of Oregon and Washington, and the four Indian tribes had submitted to the district court for approval a Columbia River fish management plan to implement the judgment. Pet. App. C4. The plan had been under negotiation among the respondents since 1983, and petitioner knew of those negotiations since at least 1984. Pet. App. C18-C19. The court of appeals held that the district court did not abuse its discretion in denying petitioner's motion to intervene as untimely (Pet. App. A56-A57), and the district court further held that intervention was not warranted in any event because petitioner has no interest directly affected by the plan or this case. Pet. App. C35.

1. a. Petitioner occupies a reservation on the northwest point of the Olympic Peninsula in the State of Washington (see Pet. App. E1 (map)) and holds a right secured by treaty to take fish in an area of the Pacific Ocean extending seaward from the Washington coastline.[1] The part of petitioner's

---

[1] The right of petitioner's members to fish in this area is derived from Article IV of the Treaty with the Makah Tribe of Jan. 31, 1855, 12 Stat. 940, as construed and applied in

ocean fishery that lies three or more miles seaward of the coast is subject to federal regulations promulgated by the Secretary of Commerce pursuant to the Fishery Conservation and Management Act of 1976 (Magnuson Act), 16 U.S.C. 1801 *et seq.* See § 304, 16 U.S.C. 1854; Pet. App. A6-A7, C10-C11. The Secretary adopts those regulations after receiving the recommendation of the Pacific Fishery Management Council (PFMC), which is established by Section 302(a)(6) of the Magnuson Act, 16 U.S.C. 1852(a)(6), to formulate management measures for ocean fisheries within the 197-mile "exclusive economic zone" that lies between 3 and 200 miles seaward of the coast of Washington, Oregon, and California. The PFMC has 13 voting members, including the state fishery management official from each of the three coastal States plus Idaho, a regional director of the National Marine Fisheries Service in the Commerce Department's National Oceanic and Atmospheric Administration, one representative of Indian tribes having a right to take fish from the ocean, and eight at-large members appointed by the Secretary of Commerce from among nominees submitted by the governors of the four States. See *Makah Indian Tribe* v. *Verity*, 910 F.2d 555, 556-557 (9th Cir. 1990); *Washington Crab Producers, Inc.* v. *Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1991).

The area of petitioner's ocean treaty fishery between the Washington coast and three miles seaward is subject to tribal and limited state regulation.

United States v. *Washington*, 626 F. Supp. 1405, 1466-1468 (W.D. Wash. 1982), aff'd, 730 F.2d 1314, 1318 (9th Cir. 1984).

That portion of the fishery is also subject to the jurisdiction of the United States District Court for the Western District of Washington in *United States* v. *Washington*, Civil No. 9213, a complex fishing-rights case to which petitioner is a party. See *United States* v. *Washington*, 384 F.Supp. 312, 363-365, 400, 406 (W.D. Wash. 1974), aff'd and modified, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 n.2, 663 n.3, 664, 670 n.15 (1979); Pet. App. A5-A6; *Washington Crab Producers, Inc.* v. *Mosbacher*, 924 F.2d at 1442.

Petitioner has never claimed a treaty right to take fish from the Columbia River or its tributaries. However, fish harvested by petitioner's members from the ocean include anadromous species that are born in inland waters of the Columbia River System, migrate to the ocean, and, after reaching maturity, migrate back to their inland places of origin to spawn. See *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1019-1020 (1983).

b. The instant case, styled *United States* v. *Oregon*, was commenced in 1968 in the United States District Court for the District of Oregon. Pet. App. C1-C3. In 1969, the district court entered a declaratory judgment in favor of the United States and four Indian tribes,[2] holding that the tribes have rights protected by treaty to take fish from usual and accus-

---

[2] The four tribes, respondents herein, are the Confederated Tribes of the Warm Springs Reservation of Oregon; the Confederated Tribes of the Umatilla Indian Reservation in Oregon; the Confederated Tribes and Bands of the Yakima Indian Nation in Washington; and the Nez Perce Tribe in Idaho.

tomed places on the Columbia River and its tributaries and that the State of Oregon has only limited regulatory authority as regards those treaty rights. *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Or. 1969). That judgment was never appealed. The district court retained jurisdiction to permit future enforcement or modification of the judgment. Pet. App. C5.[3]

The States of Washington and Idaho were granted leave to intervene in this case in 1974 and 1984, respectively. See *Sohappy* v. *Smith*, 529 F.2d at 572; *United States* v. *Oregon*, 745 F.2d at 553; Pet. App. C6, C8. In 1986, respondent Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho were granted leave to intervene because they claimed interests in upriver fisheries of the Snake River (the major tributary of the Columbia River) and the Snake's tributaries, although those rights have never been judicially defined. Pet. App. A37-A38, C9-C10.[4]

2. a. Since entry of the judgment in 1969, respondents and the district court have undertaken to apply its requirements to each run of migrating fish entering the Columbia River System. Pet. App. A4-A5. At the court's urging, respondents attempted to design a comprehensive in-river fish management plan, subject to periodic approval by the court, for each seasonal run. In 1977, respondents agreed to a plan for the Columbia River. After that plan expired, the district court, in September 1983, ordered

---

[3] Post-judgment orders have been the subject of five prior appellate decisions, reported as *Sohappy* v. *Smith*, 529 F.2d 570 (9th Cir. 1976), and *United States* v. *Oregon*, 657 F.2d 1009 (9th Cir. 1981); 718 F.2d 299 (9th Cir. 1983); 745 F.2d 550 (9th Cir. 1984); and 769 F.2d 1410 (9th Cir. 1985).

[4] The Confederated Tribes of the Colville Reservation were permitted to intervene in 1989. See Pet. 9.

respondents to negotiate a new comprehensive management plan and to submit either an agreed plan or alternative plans for approval by the court. Since at least 1984, representatives of petitioner were aware of the status of the case and the pendency of the negotiations, but petitioner did not seek to intervene while they were in progress. See Pet. App. C18-C19; Pet. C.A. Br. 30; Resp. Tribes and States Jt. C.A. Br. 18.

b. In early 1988, representatives of the United States, the four Columbia River tribes, and the States of Oregon and Washington signed the 1988 Columbia River Fish Management Plan, which for most purposes has a ten-year duration. The 74-page Plan establishes a comprehensive organizational and procedural framework to manage (through the mechanism of annual negotiations among federal, state, and tribal fishery management entities) the propagation, allocation, harvest, and conservation of anadromous fish runs within the Columbia River System for the benefit of treaty Indian fisheries and non-Indian fisheries. In March 1988, the Plan signatories filed a joint motion in the district court for approval of the Plan. Pet. App. C11-C12.

3. a. After the Plan was submitted to the district court, petitioner filed a motion for intervention as of right under Fed. R. Civ. P. 24(a)(2) and for permissive intervention under Fed. R. Civ. P. 24(b), and it presented a proposed brief opposing the Plan.[5]

---

[5] Petitioner requested the court either to disapprove the Plan or to stay its decision pending the outcome of a separate case brought by petitioner, *Makah Indian Tribe* v. *Baldrige*, Civil No. C87-747-RC (W.D. Wash.), in which petitioner challenged the regulations adopted by the Secretary of Commerce under the Magnuson Act to allocate the ocean harvest

The signatories did not oppose granting petitioner limited permissive intervention or amicus status for purposes of objecting to the Plan, but they opposed granting it full-fledged party status. The court denied intervention, finding, *inter alia*, no appropriate way to limit petitioner's participation. The court did, however, leave open the possibility of judicial relief after petitioner exhausted its remedies under the Magnuson Act. Pet. App. C13-C20, C30, C36, C38-C40.

The court first concluded that petitioner's motion was untimely. It reasoned that the submission of the 1988 Plan for approval did not constitute a new stage of the case, because the parties had engaged in negotiations since the original plan expired in 1982 and the court had ordered the parties to negotiate a new plan in 1983. The court found that petitioner was aware of those negotiations and should have moved to intervene within a reasonable time after Idaho was permitted to intervene in 1984, or at least after the Shoshone-Bannock Tribes were permitted to intervene in 1986. Finally, the court noted that petitioner

---

of migrating Columbia River Salmon for 1987. The district court subsequently dismissed that suit because of the absence of the 23 Indian tribes having fishing rights in Puget Sound, the Columbia River, and the ocean fishery, which could not be joined because of tribal sovereign immunity. On petitioner's appeal, the court of appeals affirmed in part and reversed in part, holding that the district court had properly dismissed the case insofar as petitioner challenged the quota for 1987, but that the action could proceed insofar as petitioner challenged the procedures adopted by the Secretary in promulgating the regulations. *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir. 1990); see pp. 20-22, *infra*. *Verity* was decided by the same panel that rendered the decision that is the subject of the instant petition, but petitioner elected not to seek review in *Verity*.

offered no reason for its delay in moving to intervene, while during that period of delay, the parties had made "significant strides" in agreeing to the Plan before the court. To allow petitioner to intervene, the court concluded, "would require the parties to start negotiating all over again," which "would significantly prejudice the existing parties." Pet. App. C18-C20.

The district court did not rest its denial of intervention on untimeliness grounds alone. It also found that petitioner's interest in the ocean fishery would not be directly affected or impaired by operation of the 1988 Plan, noting that petitioner's "interest * * * arises from its treaty right in ocean fisheries, not in a treaty right in the Columbia River fisheries which are involved in this action." Pet. App. C34. The court recognized that petitioner's ocean treaty right includes the right to harvest "some fish bound for the Columbia River," *id.* at C33, and that "decisions made concerning what will happen upstream from the mouth of the Columbia River may in some way affect" petitioner's ocean fishery. *Id.* at C24. However, in the court's view, "this very aspect of possible individual interests strikes against intervention." *Ibid.* The court explained that this case has been limited t issues concerning the taking of fish from the Columbia River System itself, and to adjudicate petitioner's interests in taking fish from the Pacific Ocean would invite intervention by other tribes from Washington, Canada and Alaska, as well as commercial and sports fishermen, having an interest in taking fish from the ocean, and would greatly expand the scope of this case. *Id.* at C24-C25.

The court further reasoned that any effects on Pacific Ocean fisheries resulting from in-river management decisions made pursuant to the 1988 Plan

are indirect, because "[e]xclusive and direct regulation of [Pacific O]cean fisheries is controlled by the Magnuson Act," through the Commerce Department and the Pacific Fishery Management Council. Pet. App. C30. The court reasoned that any challenges to such direct regulation of the ocean fisheries by the Commerce Department, or to any possible indirect regulation by the Oregon-Washington Compact Commission,[6] "should first be addressed to those agencies." *Ibid.* Because challenges to agency actions "with regards to ocean fisheries are beyond the scope of this litigation," Pet. App. C31, they normally would have to be pursued in a separate case. However, the court left open the possibility that challenges to actions of the Commerce Department or the Compact Commission "may be appropriate before [the district] Court," but only "after all other remedies are exhausted." *Id.* at C30.

b. The district court also approved the 1988 Plan as modified, Pet. App. B2-B3, for reasons explained in a separate opinion, *United States* v. *Oregon*, 699 F. Supp. 1456 (D. Or. 1988). In that separate opinion, the court specifically addressed and rejected not only the objections of Idaho and the Shoshone-Bannock Tribes, but also the objections of petitioner and other amici curiae. 699 F. Supp. at 1461, 1468-1469; see also Pet. App. A58, C40.[7]

---

[6] Oregon and Washington are parties to the Oregon-Washington Columbia River Fish Compact, Act of Apr. 8, 1918, ch. 47, 40 Stat. 515, which provides a system to assure uniformity in regulation of the fish resources by both States on the interstate portion of the Columbia River's mainstream from the River's mouth to its confluence with the Snake River.

[7] The court rejected petitioner's contention that the 1988 Plan violated the Magnuson Act and its treaty right to take

4. On petitioner's appeal, the court of appeals affirmed the district court's denial of petitioner's motion to intervene solely on the ground that the motion was untimely. Pet. App. A44-A57. In the consolidated appeal by Idaho and the Shoshone-Bannock Tribes, the court of appeals also affirmed the district court's rejection of their objections to the Plan on the merits. Pet. App. A9-A44, A59. Idaho and the Shoshone-Bannock Tribes have not sought review of that holding approving the Plan. The court of appeals did not review petitioner's substantive objections to the 1988 Plan, which had been considered and rejected by the district court, because petitioner's "status is similar to that of an amicus curiae," who "may not appeal the [district] court's decision." Pet. App. A58.

In this Court, petitioner no longer seeks review of the denial of intervention for purposes of opposing the district court's approval of the 1988 Plan, and it has abandoned its objections to the Plan. See Pet. 23-24, 51 n.37.[8] It now seeks intervention principally to participate in future annual negotiations *under* the Plan (Pet. 23-24).

---

fish from the ocean, noting that this action is restricted to rights to take fish from the Columbia River. The court also rejected petitioner's contentions that the United States' participation in the Plan violated its trust responsibilities to petitioner and that an environmental impact statement should have been prepared in connection with the Plan. 699 F. Supp. at 1468-1469.

[8] In its petition for rehearing (at 1 n.1) in the court of appeals, petitioner for the first time abandoned its objections to the Plan and sought to limit its intervention to subsequent proceedings in the case. See Pet. 23-24. Petitioner's opening brief had requested the court of appeals to "reverse the [district court's] order approving the Plan" (Pet. C.A. Br. 51).

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioner's motion to intervene in this case on the ground that the motion was untimely. That fact-bound determination, in the context of this complex case, does not warrant review by this Court, especially since participation by petitioner to advance its interests in taking fish from the Pacific Ocean would greatly expand the scope of this case. As the courts below held, and as petitioner does not dispute, petitioner's ocean fishery is instead subject to direct and exclusive regulation by the Secretary of Commerce under the Magnuson Act. Petitioner objects that the court of appeals, in affirming the district court's ruling that its motion to intervene was untimely, did not consider a factor that has been considered by some other courts of appeals—namely, possible prejudice to the applicant if intervention is denied. However, petitioner did not raise that issue in the court of appeals by requesting that court to include an additional factor in its timeliness determination, and the district court in any event found that petitioner's interests would not be impaired by the denial of intervention. Petitioner's belated effort to interject that issue into this case therefore does not warrant this Court's review.

1. If a motion to intervene is untimely, as petitioner's motion was held to be by the courts below, it "must be denied" under Fed. R. Civ. P. 24. *NAACP* v. *New York*, 413 U.S. 345, 365 (1973). A district court's determination on the question of timeliness will not be disturbed on review unless it constitutes an abuse of discretion. *Id.* at 366. Here, as the court

of appeals held, the district court did not abuse its discretion in finding petitioner's motion untimely.

In accordance with established Ninth Circuit precedent, including its decision on a prior appeal in this case involving Idaho's motion to intervene, the court of appeals considered "three criteria to evaluate timeliness: the stage of the proceeding, prejudice to other parties, and the reason for and length of the delay." Pet. App. A48 (citing *United States* v. *Oregon*, 745 F.2d at 552). The court acknowledged that although this action has been underway for almost 20 years, the length of time that has passed is not alone dispositive. Nevertheless, as the court recognized, petitioner's motion was extremely belated. Pet. App. A48-A52.

This is not an instance in which the applicant requested intervention at the *beginning* of the remedial stage of a case. Pet. App. A48-A50. Petitioner sought to intervene 19 years after judgment was entered; after the parties had already operated under one fishery management plan, had been ordered by the district court to negotiate another such plan, and had conducted such negotiations over a five-year period; and after the Plan agreed to by the United States, the States of Oregon and Washington, and the four Columbia River tribes had been submitted to the court for its approval. As both courts below concluded, the existing parties would have been seriously prejudiced if petitioner had been permitted to intervene, because its challenges could have upset the delicate balance reflected in the complex and carefully negotiated Plan. *Id.* at A48, A52-A54, C19-C20.

Petitioner now insists (Pet. 47-48) that the parties' efforts in negotiating the Plan, and obtaining

judicial approval of it, would not be upset if petitioner's intervention were limited to future participation in the case, and specifically to participation in negotiations under the Plan. As the court of appeals pointed out (Pet. App. A51), however, petitioner did not request such limited intervention in the district court, and the district court concluded that limited intervention was not feasible. Indeed, petitioner did not abandon its efforts to intervene to oppose the Plan until after the court of appeals rendered its decision. See Pet. 23-24. The courts below therefore cannot be faulted for failing to approve the narrower scope of intervention petitioner is now prepared to accept.

Furthermore, the basis for petitioner's participation (protection of its interest in taking fish from the Pacific Ocean) would have greatly expanded the geographic scope of the litigation. In fact, to the extent petitioner once sought to intervene in this case in order to obtain an adjudication and protection of its treaty right vis-a-vis the rights of the four Columbia River tribes, petitioner in effect sought to require the United States to convert this action into one brought by the United States on behalf of petitioner to protect its ocean fishery, or to overcome the sovereign immunity of the United States and the Columbia River tribes in order to accomplish such an adjudication over their objections. Such an expansion of the suit might have required joinder of others having an interest in fishing in the Pacific Ocean as well. As the court of appeals observed, "[t]he district court concluded that at this stage, it is too late in the proceeding to change the nature of the suit so dramatically," and "[i]n light of the district court's discretion to control the course of proceedings before

it, this decision was not an abuse of discretion." Pet. App. A52 (citation omitted). That is especially so because Congress enacted the Magnuson Act in 1976, after the judgment in this case was entered in 1969, to place ocean fisheries under a different regulatory mechanism.[9]

It presumably is for these reasons that petitioner has abandoned any effort to intervene to challenge the 1988 Plan, which simply implements the judgment declaring the in-river fishing rights of the other tribes. But because the 1988 Plan itself rests on the premise that the scope of this case is limited to the taking of fish from the Columbia River System—and because petitioner's fishing rights lie outside that System—it would be particularly odd, in view of petioner's acquiescence in the holding below that it may not intervene to challenge the Plan, to find that petioner nevertheless has a right to intervene to participate in *implementing* the Plan.[10]

---

[9] The court of appeals correctly noted that the proposed intervention by petitioner was readily distinguishable from the intervention by Idaho, the Shoshone-Bannock Tribes, and the Colville Tribes, which did not alter the geographic scope of the litigation. Pet. App. A51-A52. Contrary to petitioner's assertion (Pet. 51-53), the necessary expansion of the geographic scope of the case is not a factor unrelated to the timeliness of intervention. The greater the passage of time since entry of the original decree, during which the parties adjusted to and operated under provisions of limited geographic reach, the less basis there is for disturbing those established patterns of judicial administration and related governmental regulation.

[10] In any event, the Plan does not preclude participation by petitioner. For example, in the Plan section governing fall chinook salmon (§ II.I.5.), upon which petitioner relies (Pet. 16-17), the Plan contemplates conferral and agreement among "management entities" with respect to ocean and in-river fish-

Finally, because petitioner offered no explanation for its delay in seeking intervention, Pet. App. C19, the district court plainly did not abuse its discretion in finding that the third of the factors relevant to the timeliness inquiry—the reason for and length of the applicant's delay—weighed against intervention. *Id.* at C20. In the court of appeals, petitioner sought to correct this defect by arguing that it did not know that its interests would be affected by the proceedings in this case. See *Id.* at A54. This argument is unavailing. In the first place, petitioner is *not* significantly affected by this case, because its interests are in taking fish from the Pacific Ocean, not the Columbia River System, and, as petitioner concedes (Pet. 19-20), the courts below made clear that the Secretary of Commerce is not bound by proceedings in this case in setting ocean-fishing quotas under the Magnuson Act. The district court expressly rejected the notion that the 1988 Plan "overlaps or usurps the authority of the PFMC under the Magnuson Act, as Section I B 6 of the 1988 Plan specifically recognizes the preemptive authority of acts of Congress," and it pointed out that "[t]he parties have indicated that they recognize [these] limits of the agreement." Pet. App. C26; see *id.* at A47 (court of appeals notes

---

ing regimes. Insofar as ocean fishing is concerned, the term "management entities" encompasses petitioner, as part of the negotiation process leading to the formulation of the PFMC's recommendations to the Secretary of Commerce under the Magnuson Act. In addition, the Plan provides for distribution to such management entities of materials and reports developed by advisory committees established under the Plan. See Gov't C.A. App. 23-24; Resp. Tribes and States Jt. C.A. Br. 34-35.

district court's holding that "the plan does not bind the federal officials").[11]

Second, to whatever extent petitioner's interests may be indirectly affected—because the PFMC will take into account actions proposed by management entities responsible for implementing the 1988 Plan (see Pet. 14-17), or because those management entities in turn will evaluate the ocean fisheries as well as the in-river fisheries—the district court found that petitioner was aware of the status of this case and the negotiations as early as 1983. Pet. App. C18-C19. The court of appeals sustained that finding, noting that interim plans adopted prior to 1988 referred to ocean fisheries as well as in-river fisheries, that petitioner had made repeated inquiries about the negotiations, and that although petitioner claimed on appeal that it had been deceived about their scope, it had not raised that argument before the district court. *Id.* at A55-A56. That fact-bound ruling does not warrant review by this Court.

2. Petitioner contends (Pet. 24-40) that in deciding whether the motion to intervene was untimely, the court of appeals should have considered a factor in addition to the stage of the proceedings, prejudice to existing parties that would result from petitioner's intervention, and the reasons for and length of petitioner's delay in seeking intervention—namely, the extent to which petitioner's interests would be prejudiced if intervention was denied. Petitioner urges the Court to grant certiorari to resolve a circuit conflict

---

[11] Because petitioner is not legally bound by any actions taken in this case, *Martin* v. *Wilks*, 490 U.S. 755 (1989), on which petitioner relies (Pet. 54-58), is of no relevance. *Martin* v. *Wilks* did not address the question of when an attempt to intervene should be regarded as untimely.

on the question whether prejudice to the applicant should also be considered. *Ibid.* The asserted circuit conflict may be more apparent than real, but it does not in any event warrant review in this case.

In recent decisions this Court has declined to review, the Third, Fourth, and Eighth Circuits have considered essentially the same three factors upon which the court below relied. *Donovan* v. *United Steelworkers*, 721 F.2d 126, 127 (3d Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *Gould* v. *Alleco*, 883 F.2d 281, 286 (4th Cir. 1989), cert. denied, 110 S. Ct. 870 (1990); *Jenkins by Agyei* v. *Missouri*, 855 F.2d 1295, 1316-1318 (8th Cir. 1988), cert. denied, 490 U.S. 1034 (1989) (as explained in *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1659-1660 (1990)). Five other Circuits have, in addition, considered prejudice to the would-be intervenor—a factor identified in *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977). But although *Stallworth* held that the intervention request was timely, its holding, based on the application of other factors, made it unnecessary to consider the additional factor petitioner urges. 558 F.2d at 267. See also *Jones* v. *Caddo Parish School Board*, 735 F.2d 923, 936-937 (5th Cir. 1984) (en banc) (holding that all four factors militated against timeliness and giving no decisive weight to any single factor). It likewise does not appear that any of the four other courts of appeals has assigned any controlling weight to this additional factor, or that it has proven to be decisive in many cases.[12] The identification of this additional

---

[12] The *Stallworth* "four-factor" formulation has been announced, with some qualification, in the following four Circuits:

First: *Caterino* v. *Barry*, 922 F.2d 37, 40-43 (1st Cir. 1990) (all four factors disfavor timeliness); *Fiandaca* v. *Cunning-*

factor by some courts of appeals therefore does not present the sort of concrete circuit conflict that warrants resolution by this Court.

Even if we assume, however, that the issue petitioner raises might warrant review at some time, this is not the appropriate case. Petitioner did not request the Ninth Circuit panel to consider the additional factor it now says is critical to the timeliness determination; it instead contended that it satisfied the three-factor test for timeliness of intervention under the Ninth Circuit's decision on a prior appeal in this case, *United States* v. *Oregon*, 745 F.2d at

---

ham, 827 F.2d 825, 834-835 (1st Cir. 1987) (all four factors favor timeliness); *Culbreath* v. *Dukakis*, 630 F.2d 15, 20 (1st Cir. 1980) (all four factors disfavor timeliness).

Second: *Farmland Dairies* v. *New York State Dep't of Agric.*, 847 F.2d 1038, 1043-1044 (2d Cir. 1988) (four factors are not exhaustive but are "guide[s]" in assessing totality of circumstances as to timeliness; factors disfavor timeliness).

Seventh: *City of Bloomington* v. *Westinghouse Elec. Corp.*, 824 F.2d 531, 534-537 (7th Cir. 1987) (all four factors disfavor timeliness); *United States* v. *Kemper Money Mkt. Fund*, 704 F.2d 389, 391 (7th Cir. 1983) (factors favor timeliness); but cf. *United States* v. *City of Chicago*, 897 F.2d 243 (7th Cir. 1990) (intervention request for leave to appeal an anti-discrimination case settled by original parties held untimely; four factors not discussed).

Eleventh: *Walker* v. *Jim Dandy Co.*, 747 F.2d 1360, 1364, 1366 (11th Cir. 1984) (district court instructed to consider several factors, including prejudice to applicant, with no mention of relative weight to be given each factor); *United States* v. *Jefferson County*, 720 F.2d 1511, 1517-1519 (11th Cir. 1983) (all four factors disfavor timeliness; prejudice to the would-be intervenor, is not "sufficient" to give it weight where the applicant "could not be bound" by the judgment (see *Martin* v. *Wilks*, *supra*) or where the applicant's interests are "adequately represented" by an existing party, 720 F.2d at 1517).

552. See Pet. C.A. Br. 28-34; Pet. C.A. Reply Br. 15-22. And although petitioner filed a suggestion of rehearing en banc, it did not request the en banc Ninth Circuit to overrule circuit precedent and adopt a four-factor test; to the contrary, petitioner once again endorsed the three-factor test applied in *United States* v. *Oregon* and by the panel below. Pet. C.A. Reh'g Pet. 5. This Court has traditionally declined to consider issues that were neither raised nor decided below, and there is no reason to depart from that practice in this case.

Here, the district court considered *all* factors governing intervention, not just timeliness. As a result, it considered whether petitioner's interest was such that "the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," Fed. R. Civ. P. 24(a)(2); see Pet. App. C20-C31, and found that petitioner would not be prejudiced if intervention was denied. *Id.* at C28-C29, C35. The district court held that petitioner's interests in its ocean fishery were only indirectly affected, *id.* at C26-C27, C30-C31, that petitioner had other remedies under the Magnuson Act, *id.* at C27-C28, and that challenges to those or other determinations "as to regulation of anadromous fish within the Columbia River" might be presented to the court "after all other remedies have been exhausted." *Id.* at C30. Accordingly, specific consideration of possible prejudice to petitioner's interests would have had no bearing on the finding by both courts below that its motion to intervene was untimely. Moreover, if petitioner had argued to the Ninth Circuit that possible prejudice to its interests should be considered on the threshold question of timeliness, the panel or en banc court would have had a record on which to address that question. Petitioner should not be permitted to

BEST AVAILABLE COPY

bypass orderly appellate processes by presenting that argument for the first time in this Court.

3. As the district court concluded (Pet. App. C30), since petitioner's ocean fishery is subject to an entirely different regulatory regime under the Magnuson Act, petitioner should advance its interests in separate proceedings under that Act. The management of ocean chinook salmon fisheries off the Washington coast, an important component of petitioner's treaty fishery, is governed by the 1984 "Framework Amendment" to the Fishery Management Plan, as amended. 50 C.F.R. Pt. 661. Annual pre-season management specifications under the Framework Amendment process are formulated between March and May of each year. 50 C.F.R. Pt. 661, App. II.A. Public hearings conducted by the Pacific Fishery Management Council assure input by the public, including petitioner. Additionally, in a series of meetings, the PFMC prepares its recommended management specifications for action by the Secretary of Commerce. See, *e.g.*, Notice of 1990 Fishery Management Measures and Request for Comments, 55 Fed. Reg. 18,894, 18,895 (May 7, 1990). Section 302(i) of the Magnuson Act, 16 U.S.C. 1852(i), requires such PFMC meetings and PFMC committee meetings to be public, except for meetings pertaining to national security, employment matters, or briefings on litigation.

Nevertheless, petitioner contends (Pet. 38, 55) that relief under the Magnuson Act is barred by another decision of the court of appeals, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir. 1990) (discussed in note 5, *supra*). *Verity* in no way curtails petitioner's rights under the administrative procedures just described. Nor does it foreclose all judicial relief.

In *Verity*, petitioner sued the Secretary of Commerce challenging limits to ocean fishing quotas for the 1987 season. Both the district court and the court of appeals held that what petitioner was actually seeking was a favorable reallocation of the 1987 fish harvest theretofore allocated to other Indian treaty fisheries of other tribes. 910 F.2d at 557, 559. The court of appeals concluded that the absent tribes were indispensable parties to such an adjudication, and that because of tribal sovereign immunity they could not be joined without their consent; accordingly, the portion of the case seeking reallocation of the Indian treaty harvest was dismissed. *Id.* at 557, 560. However, the Ninth Circuit reinstated the claims of petitioner that sought prospective relief concerning alleged defects in the administrative procedures followed by the Commerce Department in adopting Magnuson Act regulations. It thus is a considerable overstatement for petitioner to claim (Pet. 55) that *Verity* bars any "separate action to challenge the results of * * * the * * * ocean management process" under the Magnuson Act. And even if *Verity* had done so, petitioner chose not to seek immediate review of the interlocutory decision in that case, and there will be time enough for petitioner to seek further review in *Verity* (or to seek other relief) following the proceedings on remand.

Finally, whatever disadvantage *Verity* may present for petitioner results not from any proceedings in this case, but from the independent bar of sovereign immunity, which protects petitioner and other Indian tribes from unconsented suits to adjudicate their rights in fisheries and other natural resources. The invocation of sovereign immunity in *Verity* should not serve as a justification for petitioner to

obtain certiorari or intervention in this separate case. *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), cert. denied, 425 U.S. 903 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ROBERT L. KLARQUIST
DIRK D. SNEL
Attorneys

JUNE 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20506